Supreme Court, U.S.
FILED

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No. 03-___

IN THE

Supreme Court of the United States

Marvin and Lynn St. Germain, *et al.*,
Petitioners,

v.

U.S. Home Corporation

On Petition for a Writ of Certiorari
to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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January 13, 2003

QUESTIONS PRESENTED

1. Is application of the provisions of the Federal Arbitration Act valid as to an intrastate contract for the sale of new residential properties when the only conceivable connection to interstate commerce is long ago completed construction activity?

2. Does application of the provisions of the Federal Arbitration Act to a contract evidencing a transaction involving the sale of a completed home invade the province of traditional and primary powers of the State of California to regulate housing and construction such that the Federal Arbitration Act should not be given preemptive effect?

3. Does the principle of *stare decisis* require continued adherence to the Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1985) as to the application of the provisions of the Federal Arbitration Act to actions filed in state courts?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Charles and Monica Stansell, Salvatore and Tula Coco, Marian and Maria Olesky, Wayne and Dianna Martin, Saundra Dendy, Lawrence and Dena Brown, Anthony and Vicki Bonofiglio, Keith and Penny Davis, John and Yolanda Fullinwider, Kevin Tierney and Camille Reineke, Alberto and Victoria Garcia, Gary and Cynda Jerger, Assador and Valentine Farajian, Suzy Farajian, Arpy Farajian, Robert Vergura, Amy Workman, Michael Brown, Dena Brown, David Brown, Monica Stansell, Monique Stansell, Chanel Stansell, Victoria Garcia, Christian Garcia, Nourit Vergura, Robert Vergura, Noah Vergura, Chanelle Vergura, and Patricia McLaughlin. In addition, the following parties appeared below and are cross-defendants here: Abubo Concrete, Inc.; Geosoils, Inc.; Bruce B. Keith Architect; Commanche Concrete, Inc.; and Maddox Concrete.

STATEMENT PURSUANT TO RULE 29.6

No corporate entities are petitioners herein.

RULE 29.4(C) CERTIFICATION

Petitioners certify that 28 U.S.C. 2403(b) does not apply and that this Petition does not need to be served upon the Attorney General of California.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
RULE 29.6 STATEMENT ii
RULE 29.4(C) CERTIFICATION ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 5
I. PRIOR INTERSTATE ACTIVITY DOES NOT BRING A CONTRACT WITHIN THE AMBIT OF THE COMMERCE CLAUSE SUCH AS TO PREEMPT CALIFORNIA LAW INVALIDATING ARBITRATION CLAUSES IN CONSTRUCTION DEFECT ACTIONS 6
A. Regulation of Construction and Housing Constitutes an Exercise of the State's Traditional and Primary Powers Under the Police Power of the States 12
B. Any Connection with Interstate Commerce is Lacking or so Attenuated That the Power of Congress to Regulate this Contract Cannot be Utilized 17

Pages

II. THE PRINCIPLE OF *STARE DECISIS* SHOULD NOT PRECLUDE THIS COURT FROM RE-EXAMINING ITS DECISIONS IN *SOUTHLAND V. KEATING* AND *ALLIED BRUCE V. TERMINIX* 19

A. The Legislature Did Not Intend the FAA to be Applied to Cases in State Court Actions. Thus the Decisions in Southland and Allied-Bruce Should Not Preclude This Court From Reversing Its Position 20

B. The Principle of *Stare Decisis* Should Not Preclude the Court From Re-Examining its Position 21

1. *Stare Decisis* Should Not be Controlling When Earlier Decisions Were Erroneously Decided 21

2. *Southland* and Its Progeny Have Created Problems Both for the Courts and for Consumers, Such That *Stare Decisis* Should Not Control 22

i. Recent Developments Justify Re-Examining *Southland* 23

ii. Purported Reliance on *Southland* Does Not Justify Continued Adherence to This Decision 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Pages**

A.L.A. Schecter Poultry Corp. v. United States,
295 U.S. 495 (1935) 10, 17-18

Allied-Bruce Terminix Companies, Inc. v. Dobson,
513 U.S. 265 (1994) 5, 8, 19-24, 26

Aronov Realty v. Morris,
(2002) 2002 Ala. LEXIS 129, 23-25 16

Basura v. U.S. Home Corp.,
98 Cal.App. 4th 1205, 1213 24

Bernhardt v. Polygraphic Co.,
(1956) 350 U.S. 198 13

Casarotto v. Lombardi,
901 P.2d 596 (Mont. 1995) 24

Chicago Board of Trade v. Olsen,
262 U.S. 1, 35 11

Doctor's Associates, Inc. v. Casarotto,
(1996) 517 U.S. 681 23-25

Gibbons v. Ogden,
22 U.S. 1, 9 Wheat. 1, 6, L.Ed. 23 (1824) 13

Gorieb v. Fox,
274 U.S. 603 (1927) 14

IAPMO v. Cal. Building Standards Comm.,
(1997) 55 Cal.App. 4th 245, 248 12

Pages

Cases

Jones v. United States,
(2000) 529 U.S. 848 15-16

L & L Kempwood v. Omega Builders,
(1998) 972 S.W. 819, 821 . . . . . 19, 24

Lemke v. Farmers Grain Co.,
258 U.S. 50, 55 11

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1, 81 (1937) 17-18

Palm Harbor Homes, Inc. v. McCoy,
944 S.W. 2d 716 (1997) 24

Pardee Construction Co. v. Superior Court,
100 Cal.App. 4th 1081 (2002) 25

Russell v. United States,
(1985) 471 U.S. 858) 16

Smith v. Albright,
321 U.S. 649 (1944) 21

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 14-15

Southland Corp. v. Keating,
465 U.S. 1 (1984) 5-6, 19-26

Stafford v. Wallace,
258 U.S. 495, 519 11

Pages

Cases

Swift & Co. v. United States,
196 U.S. 375, 388 11

Swift & Co. v. Wickham,
382 U.S. 111, 116 (1965 22

Tagg Bros. & Moorhead v. United States,
280 U.S. 420, 439 11

United States v. Lopez,
514 U.S. 549 (1995) 5, 8-14, 16-19, 23-24

United States v. Mennuti,
639 F.2d 107 (2nd Circ. 1981) 16

United States v. Morrison,
529 U.S. 598 (2000) 5, 10, 14, 19, 23-24

Villa Milano Homeowners Association v. Il Davorge,
84 Cal.App. 4th 819 (2000) 25

Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
(1988) 489 U.S. 468, 477 . . . 3, 9, 13, 19, 23-24

Wickard v. Filburn,
317 U.S. 111 (1942) 18

Statutes

18 U.S.C. §844(i) 15-16

28 U.S.C. 1257(a) 1

9 U.S.C. § 2 . . . . . 5, 8

Pages

9 U.S.C.§ 3 20

9 U.S.C.§ 4 20

Cal. Bus. & Prof. Code § 5510 12

Cal. Bus. & Prof. Code § 5536 12

Cal. Bus. & Prof. Code § 6710 12

Cal. Bus. & Prof. Code § 7000.5 12

Cal. Bus. & Prof. Code §7028 12

Cal. Bus. & Prof. Code §7071.5 12

Cal. Code Civil Proc. §337.1 7

Cal. Code Civil Proc. §337.15 7

Cal. Code Civil Proc. §1281.2c 9

Cal. Code Civil Proc. §1298.7 . . . . . 6-7, 12-14

Cal. Health & Safety Code § 17921(a) 12

Cal. Health & Safety Code § 17957 12

Cal. Health & Safety Code § 17995 12

Cal. Health & Safety Code § 17995.1 12

Cal. Health & Safety Code § 19825 12

Cal. Health & Safety Code § 19826 12

Pages

Cal. Health & Safety Code § 19835 12

Federal Arbitration Act 2-3, 5-6, 20-21, 26

United States Constitution
Article 1, §8, cl. 3 ..... 1, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marvin Jr. and Lynn St. Germain, *et. al.* respectfully petition for a writ of certiorari to review the decision of the Supreme Court of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California (Pet. App. 1a) is unpublished. The opinion of the Court of Appeal of California (Pet. App. 2a) is unpublished. The order of the Superior Court granting respondents' motion to compel arbitration and to stay action (Pet. App. 3a-7a) is unpublished.

JURISDICTION

The Supreme Court of California denied review (Pet. App. 1a) on October 16, 2002. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, § 8, cl. 3 of the Constitution provides in relevant part: "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The relevant provisions of Federal and California law are reproduced in the appendix (Pet. App. 29a-45a).

STATEMENT OF THE CASE

This matter involves two consolidated actions relating to eighteen (18) residential real properties and homes in a tract development commonly known as the Woodbridge Development located in Corona, California. Defendants U.S. Home Corporation et. al. ("U.S. Home")

asserting that all claims alleged by the Plaintiffs ("Home Buyers") must be submitted to arbitration based on provisions within its original Sales Agreement and separate Limited Warranty, filed a motion to compel arbitration and stay proceedings in Superior Court for the County of Riverside, on unspecified jurisdictional grounds. Home Buyers opposed compelled arbitration.

In addition to claims asserted against U.S. Home, Home Buyers named and served numerous other parties who were not signatories to the arbitration agreement, including design professionals and subcontractors. One subcontractor filed a cross-complaint against U.S. Home.

The pertinent provision, Section 14(B) of the Sales Agreement provides, in part:

> 14. ARBITRATION OF DISPUTES.
> (B) ARBITRATION OF ALL OTHER CLAIMS AND DISPUTES. BY PLACING THEIR INITIALS HERE, BUYER /S/ AND SELLER /S/ AGREE THAT: Any controversy or claim arising under or related to this Agreement or to the Property . . . or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representatives SHALL BE SETTLED AND FINALLY DETERMINED BY MEDIATION OR BINDING ARBITRATION AS PROVIDED BY THE FEDERAL ARBITRATION ACT (9 U.S.C. SECTION 1-14). AND SIMILAR STATE STATUES AND NOT BY A COURT OF LAW. The claim will first be mediated in accordance with the Commercial Mediation Rules of the American Arbitration Association. If not resolved by Mediation, the claim will be settled in accordance with the Commercial Arbitration rules of the American Arbitration Association....

Home Buyers contended in their opposition to the motion to compel arbitration that:

1. The subject dispute did not invoke the Commerce Clause;
2. The Magnuson-Moss Act, 15 U.S.C. §2311(c)(2) allows the states to afford consumers protection;
3. The action should have been stayed pursuant to Cal.Code Civ. Proc. § 1281.2, due to the inclusion of non-signatories to the contract, pursuant to *Volt Information Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.*, (1989) 489 U.S. 468;
4. The contract did not evince an intention to arbitrate and/or was ambiguous; and
5. Fraud and unconscionability barred the compelling of arbitration. (Pet. App. 8a-14a).

The Superior Court granted the motion to compel arbitration and stay the action on [generally] the following grounds (Pet. App. 3a-7a):

1. Based on the contracts and warranties, the original purchasers agreed to arbitrate all their disputes;
2. The subsequent purchasers were bound to the terms of the contract as third party beneficiaries;
3. Minors and tenants are bound by the terms of the warranty as they are claiming its benefits;
4. The Federal Arbitration Act is controlling and inconsistent California statutes are preempted;
5. *Volt, supra*, 489 U.S. 468 is not on point because the parties expressly chose to arbitrate their claims under the FAA;
6. The arbitration contracts are not unconscionable; and
7. The arbitration clauses include both contract and tort actions.

Home Buyers subsequently filed a petition for writ of mandate or prohibition in the Court of Appeals of the State of California, Fourth District, Division Two. Home Byers contended that relief by extraordinary writ was

required in that they were being deprived of their right to trial by jury and right to appeal, and that the lower court erred in the following respects:

1. The court should have denied the motion to compel in order to avoid inconsistent results as to the numerous parties who were not subject to the terms of the contracts, pursuant to *Volt, supra,* 489 U.S.468;
2. The subject dispute did not invoke the Commerce Clause;
3. The court should not have compelled the subsequent purchaser plaintiffs, minors, and non-owners to arbitrate;
4. The court failed to find that the arbitration provisions were adhesive and unconscionable such that they could not be enforced. (Pet. App. 15a-22a).

The Court of Appeals summarily denied the writ, and Home Buyers promptly petitioned the California Supreme Court for Review. The questions present for the Petition for Review included:

A. Whether California law relating to arbitration is preempted when the sales agreement contains a provision referencing both the FAA and California law;
B. Whether litigation involving construction defects in homes, which are primarily used for residential purposes, invoke the Commerce Clause;
C. Whether the arbitration clauses are unconscionable;
D. Whether non-signatories to the sales agreements should be compelled to arbitrate their disputes. (Pet. App. 23a-28a).

The California Supreme Court summarily denied the Petition for Review on October 16, 2002.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted for two principal reasons. First, the California Supreme Court's ruling, in denying the Petition for Review, leaves intact the Superior Court decision compelling arbitration pursuant to the Federal Arbitration Act, in contradiction to this Court's precedents in analyzing whether or not a contract or transaction involves interstate commerce. The contracts at issue do not "evidence contracts involving interstate commerce" within the meaning of 9 U.S.C. § 2. There are no known United States Supreme Court cases interpreting this language in the context of contractual actions based on defects in fully completed new residential development homes, and very little guidance from state court cases regarding this important issue, involving not only Home Buyers in the instant action, but millions of home buyers nationwide. The California Supreme Court decided, by denying petition for review, that such sales do involve interstate commerce, resulting in invalidating state law prohibiting enforcement of arbitration clauses in construction defect cases. This important question should be decided by the United States Supreme Court. A completed home does not cross state lines and there is no interstate activity involved in the sale of the homes in the State of California. Thus, preemption of California state law prohibiting the enforcement of arbitration clauses in construction defect cases should not be preempted by the FAA.

Second, the Court should re-examine its decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), in which the Court first applied the provisions of the FAA to actions filed in state courts for two reasons. As set forth in numerous dissents and concurrences in *Southland* and its progeny, application of the FAA in state court actions is not in accord with the legislative intent of the Act.

Furthermore, recent developments, including the Court's emerging Commerce Clause jurisprudence as manifested in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison* 529 U.S. 598 (2000), justify re-evaluation of the Court's holding in *Southland*. Creation of confusion in state courts due to post-*Southland* Supreme Court decisions is not the only problem created by *Southland* and its progeny. As Justice Breyer surmised in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1994), "parties" [consisting exclusively, in the case of construction defect cases, of (usually) large development companies] have been relying on *Southland* to specifically craft their adhesive sales agreements to encompass arbitration under the FAA. Homebuyers do not draft sales agreements, and have no effective ability to negotiate them. The end effect of adhering to *Southland* will be more litigation in state courts regarding the purported unconsciousability of such agreements.

I. PRIOR INTERSTATE ACTIVITY DOES NOT BRING A CONTRACT WITHIN THE AMBIT OF THE COMMERCE CLAUSE SUCH AS TO PREEMPT CALIFORNIA LAW INVALIDATING ARBITRATION CLAUSES IN CONSTRUCTION DEFECT ACTIONS.

California consumers, specifically buyers of new homes, should not be deprived of protection of their rights under California law to trial by jury and right of appeal in actions involving construction defects in their homes, due to an invalid application of the provisions of the Federal Arbitration Act ("FAA.") Cal. Code Civil Proc. §1298.7 provides that arbitration clauses are unenforceable in actions based on defects in

construction of homes.[1] This provision is preempted by

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[1] California Code of Civil Procedure section 1298.7 provides: "In the event an arbitration provision is included in a contract or agreement covered by this title, it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable."

California Code of Civil Procedure section 337.1 provides in pertinent part:

> **"Four years; actions for damages from persons performing or furnishing design, specifications, surveying, planning, supervision or observation of construction or construction of improvement to realty**
> (a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:
> (1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property."

California Code of Civil Procedure section 337.15 provides in pertinent part:

> **"Ten years; developer, contractor, architect, etc. of real property; latent deficiency in design, supervision, etc.; injury to property**
> (a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

the FAA only if the contracts at issue involve interstate commerce. They do not.

Article 1, § 8, cl. 3 of the Constitution provides that "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." No "Commerce among the several States" is implicated in the Sales Agreements executed by the purchasers of new homes in this action

The Court has established that the phrase "involving interstate commerce,"as set forth in 9 U.S.C. § 2[2] is equivalent to "affecting commerce." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-274 (1995). However , this effect must be more than "trivial," it must be "substantial." *United States v. Lopez* 514 U.S. 549, 559, (1995). Actions involving construction defects discovered long after the completion of the labor and supply of the materials do not implicate ***any*** concerns involving interstate commerce, let alone substantial effects. Home Buyers in this matter are not asking, in their contract-based causes of action, for the developers and contractors to fix the homes, or to compensate them for labor or services provided under a contract, but, rather, to compensate them for defects in buildings completed long ago. Pursuant to 9 U.S.C. 2, the Act applies only to a "***contract*** evidencing a transaction involving

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(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property."

[2] 9 U.S.C.§ 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . .shall be valid, irrevocable, and enforceable save as upon such grounds as exist at law or in equity for the revocation of any contract."

interstate commerce." The focus should be on the nature of the contracts themselves, which in this case, and in many construction defect cases, involve intrastate sales of fully completed homes, at least as to the original purchasers, who, in the instant case, are the only ones pursuing contractually based claims.[3] Previous activity involved in building the homes, while it may have been involved in contributing to the defects, is not the basis for actions based on contracts involving the delivery of fully constructed residential homes. Thus, contracts between developers or sellers of new homes and the buyers do not constitute contracts ***evidencing*** a transaction involving interstate commerce. There is no ongoing or future conduct involved. A contract for the sale of a completed home in the State of California does not involve working in interstate commerce, purchasing products through interstate commerce, or engaging in any activity that affects interstate commerce in any way.

The Court in *Lopez* determined that a federal statute involving possession of a gun in a school zone was not a valid exercise of federal power under the Commerce Clause. Although it is a certainty that a gun is an end product of interstate production (as are residential homes), the *Lopez* Court pointed out that the mere fact that the end product itself may have had a commercial origin is not controlling:

> In a sense any conduct in this interdependent world of ours has an ultimate

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[3] Home Buyers additionally contended in proceedings below that the intent of the parties was to be subject to California law, and that pursuant to *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University* 489 U.S. 468, the action should be stayed pursuant to Cal. Civ. Proc. Code section 1281.2(c) on the basis that certain parties to the action, including subcontractors and subsequent purchasers, were not bound by the terms of the Sales Agreement.

> ***commercial origin*** or consequence, but we have not yet said the commerce clause may reach so far." *United States v. Lopez* (1995) 514 U.S. 549, 580 (Kennedy, J., concurring)(emphasis added). *See also, United States v. Morrison*, 529 U.S. 598, 611, citing this language with approval.

Significantly, none of the two extensive dissenting opinions takes issue with this proposition, or suggests in any way that the interstate origin of a gun could be a factor in the analysis.[4]

The Court has previously considered a situation in which goods from out of state had come to rest in a state. In *A.L.A. Schecter Poultry Corp. v. United States* 295 U.S. 495 (1935) the court struck down a conviction for violations of regulations fixing the hours and wages of employees of an intrastate poultry business. As summarized by Justice Thomas, *Schecter* held that "Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales) *Lopez, supra,* 514 U.S. at 599 (Thomas, J., concurring). In *Schecter,* the Court analyzed the regulation in regard to two aspects, as to whether the transactions for which the defendants were convicted were "*in*" interstate commerce, and as to whether they "directly affected" interstate commerce, in the sense of being within Congress's power to protect commerce. (*Schecter, supra,* 543 U.S. at 542, 544). The Court answered both questions in the negative. In holding

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[4] While Justice Stevens, in his brief dissenting opinion does state, "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity," his following conclusions do not rest on this proposition, but, rather, upon the harmful use of guns. *Lopez, supra,* 514 U.S. at 602, Stevens, J. dissenting).

that when materials come to permanent rest within a State, interstate commerce had ceased and the continued power of federal regulation had terminated, the Court stated, in its analysis of "interstate commerce":

> The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here.

Id. at 543 (citing *Swift & Co. v. United States, 196 U.S. 375, 388; Lemke v. Farmers Grain Co.*, 258 U.S. 50, 55; *Stafford v. Wallace*, 258 U.S. 495, 519; *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 35; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 439).(emphasis in original).

In this respect, even though this part of the

analysis dealt specifically with the "in commerce" aspect, rather than the broader "involving commerce" focus, *Schecter* is in accord with current Commerce Clause jurisprudence, and remains valid law. The activity which could conceivably be construed as "involving commerce" had long ago come to an end, and is merely an example of a transaction of "commercial origin," which, alone, will not support the exercise of federal regulation under the Commerce Clause. *Lopez, supra*, 514 U.S. at 580 (Kennedy, J., concurring).

A. Regulation of Construction and Housing Constitutes an Exercise of the State's Traditional and Primary Powers Under the Police Power of the States.

The action at issue involves claims of defects in residential real property in the State of California, as well as claims of bodily injury arising from defects in these non-movable structures. The State of California has a compelling public interest in protecting the integrity of residential real property within its territory, and has promulgated statutes to safeguard these interests. *See, e.g. , Cal. Health & Safety Code* §§ 17921(a), 17957, 17995, 17995.1, 19825, 19826, and 19835; *Cal. Bus. & Prof. Code* §§ 5510, 5536, 6710, 7000.5, 7028, 7071.5; *IAPMO v. Cal. Building Standards Comm.* (1997) 55 Cal.App. 4th 245, 248 (stating: "There is no question that regulation of the building industry is an appropriate exercise of the state's police power"). In accordance with these local public concerns, the legislature of the State of California has enacted formal statutory protections that specifically provide for resolution of disputes regarding defects in residential real property in its own courts, and invalidate arbitration clauses involving these specifically protected local interests. *Cal. Code Civil Proc.* § 1298.7.

Justice Kennedy pointed out that in testing an

extension of power under the Commerce Clause, inquiry must be made as to "whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez, supra,* 514 U.S. at 580 (Kennedy, J. concurring). This same test should be employed in analyzing whether a contract evidences a transaction involving interstate commerce. As the Court pointed out in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1988) 489 U.S. 468, 477:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA).

Therefore, the connection of interstate commerce to the contract is key, for without it, the FAA is of no effect whatsoever, and state law controls. In California construction defect actions, contract disputes do not involve interstate commerce. Therefore, California law should control, rendering arbitration clauses unenforceable, as intended by the California legislature in legislating in this field of traditional state concern. *Cal. Code Civ. Proc.* § 1298.7.

As Justice Thomas pointed out in *Lopez*, Chief Justice Marshall, in the seminal case of *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6, L.Ed. 23 (1824) "took great pains to make clear that Congress could *not* regulate commerce 'which is completely internal, which is carried on between a man and a man in a State, or between different parts of the State, and which does not extend to or affect other States.'" *Lopez, supra,* 514 U.S. at 594 (Thomas, J. concurring, citing *Gibbons, supra,* 9 Wheat. at 194, emphasis in original). As Justice Thomas further emphasized:

> Moreover, while suggesting the Constitution might not permit States to regulate interstate or

> foreign commerce, the Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State' were but a small part 'of that immense mass of legislation . . . not surrendered to a general government." *Lopez, supra,* 514 U.S. at 594 (Thomas, J. concurring, citing *Gibbons, supra,* 9 Wheat. at 203).

Here, the transactions covered by *Cal. Code Civ. Proc.*§ 1298.7 (lawsuits based on contracts involving defects in housing) concern property damage, bodily injury claims and health and safety (building code) violations; the FAA covers only lawsuits based on contracts involving commerce. Thus, in this situation, application of the provisions of the FAA, which effectively require arbitration of disputes involving interstate commerce, is invalid.

Land-use regulation and such things as zoning regulation have been held to fall squarely within the police power of the states. *See Gorieb v. Fox,* 274 U.S. 603 (1927) (set-back requirements are legitimate exercises of state police power); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001). In *Solid Waste,* the Court, in determining that the denial of a permit for development of a gravel pit for a solid waste disposal site was not authorized, did not reach the constitutional issue regarding the Commerce Clause, but specifically noted that such regulation would impinge on powers reserved to the states:

> Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States v. Morrison,* 529 U.S. 598 (2000); *United States v. Lopez,* 524 U.S. 549 (1995). . . Permitting respondents to claim federal jurisdiction over

> ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' ***traditional and primary power*** . . . . *Solid Waste, supra*, 531 U.S. at 174 (emphasis added).

In *Jones v. United States* (2000) 529 U.S. 848, the Court analyzed the application of a federal arson statute, 18 U.S.C. §844(i)[5] to a conviction for arson of an "owner-occupied residence," holding that the arson of such a property "not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity." *Id.* at 859. Thus, arson of such a building does not fall within the "compass" of section 844(i). *Id.* at 850. The court noted that:

> Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas ***is constructed with supplies that have moved in interstate commerce***, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

Id. at 857 (emphasis added).

While the Court in *Jones* focused on the "used in commerce language," and did not reach the constitutional issue, nevertheless, its guidance as to the intrinsically non-commercial nature of an owner-

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[5] 18 U.S.C. § 844(i) "makes it a federal crime to 'maliciously damage or destroy,...by means of fire or an explosive, any building....used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" *Id.* at 850.

occupied residence is instructive. However, the Court's very holding, as expressed (i.e., that the property "did not qualify as property 'used in' commerce or commerce-affecting activity"), (*Id.* at 859) suggests that it would have found that, by the same criteria, the residential property did not constitute property "affecting commerce" in the broader constitutional sense, had it chosen to address the constitutional issue.[6]

The Court in *Jones* found the reasoning in *United States v. Mennuti*, 639 F.2d 107 (2nd Circ. 1981) "persuasive." (Although noting that part of *Mennuti's* holding [as to rental properties] had been superseded in *Russell v. United States* (1985) 471 U.S. 858). *Jones, supra,* 529 U.S. at 854, n.6.)

In *Mennuti* the Court stated:

> Consequently a residence is not used in interstate or foreign commerce simply because it was built in part with out-of-state materials, its purchase was financed by a bank which engages in or whose activities affect interstate commence, it was insured by a company engaged in such commerce, it received electric power and telephone service from companies engaged in or affecting commerce, and its repair or reconstruction will require out-of state materials.

Mennuti, supra, 639 F.2d. at 110.

In the instant case, any interstate activity had ceased by the time the problems were revealed and the lawsuit filed. The homes are not going anywhere, certainly not out of state. *See, Aronov Realty v. Morris* (2002) 2002 Ala. LEXIS 129, 23-25 (upholding denial of

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[6] In fact, the dissent in *Lopez* specifically recognized that the *Lopez* holding could cast uncertainty in areas of law, including criminal statutes such as 18 U.S.C. §844(i), which use the words "affecting commerce" to define their scope.

motion to compel arbitration under FAA as to residential real property due to absence of substantial effect on interstate commerce noting: "The defendants cannot escape the fact that Morris' condominium unit is incapable of moving across state lines.") The subject dispute does not "substantially affect" interstate commerce because the transactions at issue occurred ***after*** interstate involvement was completed, and do not involve ongoing interstate commerce. Thus, federal preemption pursuant to the FAA is an invalid application of federal law.

B. Any Connection with Interstate Commerce is Lacking or so Attenuated That the Power of Congress to Regulate this Contract Cannot be Utilized

Under the Court's latest rulings, the distinction between "indirect" or remote transactions is still viable, and, as noted by the *Lopez* Court, is consistent with Commerce Clause jurisprudence. *Lopez, supra*, 514 U.S. at 557 (citing *Jones & Laughlin, supra*, 301 U.S. at 37, emphasis added).

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), is noted for the second prong of its analysis: the utilization of a distinction between "direct" and "indirect" relationships to commerce, and the finding that since there was no "direct relationship" between the intrastate poultry transactions with interstate commerce, the transactions were not subject to federal regulation. The Court's rejection of the concept of an "indirect" relationship to commerce as a basis for the regulation was in reaction to the Government's argument that a slaughterhouse operator's paying lower wages "results in demands for a cheaper grade of goods, and that the cutting of prices brings about a demoralization of the price structure." *Id.* at 548-549. No such considerations are present in

the instant matter. Once the homes were sold, the activity and transaction were complete. There were longer any direct ***or*** indirect results on interstate commerce.

Only two years after *Schecter,* the Court reversed course, and in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 (1937) the Court rejected the distinction between "direct and indirect," and, five years later, set forth the most expansive interpretation of power under the Commerce Clause, in *Wickard v. Filburn,* 317 U.S. 111 (1942), arriving at the "substantially affecting commerce" test. *Id.* at 125.

However, as pointed out by Justice Kennedy in *Lopez,* the "direct/indirect" analysis is still viable, albeit in a narrower sense:

> [E]ven these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel,* the Court warned that the scope of interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce ***so indirect and remote*** that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Lopez, supra,* 514 U.S. at 557 (citing *Jones & Laughlin, supra,* 301 U.S. at 37, emphasis added).

Rejecting the concept of finding a remote, attenuated relationship as constituting a basis for federal regulation, the Court in *Lopez* emphasized the *"substantial"* aspect of the test, as opposed to using a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."

Lopez, supra, 514 U.S. at 559. *See, L & L Kempwood v. Omega Builders* (1998) 972 S.W. 819, 821 (holding that the "affecting commerce" test in *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 273-274, did not survive *Lopez*'s articulation of a "substantially affecting" commerce test.)

The Court in *Lopez*, therefore, rejected the argument in the dissent that "the threat of firearm possession near schools poses threats to the educational process and the potential economic consequences flowing from that threat....This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education." *Id.* at 565. [And thus, equally to regulation of housing and construction, similarly distinctly local concerns]. *See also Morrison, supra*, 529 U.S. at 612, emphasizing the fact that the *Lopez* decision rested in part on the fact that a link between gun possession and a substantial effect on interstate commerce was attenuated.

In the case of the contract for sale of a completed owner-occupied residence, there is not even an attenuated or remote or indirect link between the transaction and interstate commerce. The purpose of the FAA is to ensure that arbitration provisions in contracts involving interstate commerce are enforced just as any other contract provisions. *Volt, supra*, 489 U.S. at 474. When there is no link between a contract and interstate commerce, this concern is not in issue, and the application of the FAA to enforce the arbitration clause in contravention of state law, which would render such a provision unenforceable, is invalid.

II. THE PRINCIPLE OF *STARE DECISIS* SHOULD NOT PRECLUDE THIS COURT FROM RE-EXAMINING ITS DECISIONS IN *SOUTHLAND V. KEATING* AND *ALLIED BRUCE V. TERMINIX*

A. The Legislature Did Not Intend the FAA to be Applied to Cases in State Court Actions. Thus the Decisions in Southland and Allied-Bruce Should Not Preclude This Court From Reversing Its Position.

The Court first squarely tackled the question of whether the FAA was applicable in state court actions in *Southland Corp v. Keating*, 465 US 1(1984), holding in the affirmative, by a decision in which five justices joined, one, Justice Stevens, concurred and dissented, and Justice O'Connor wrote a strong dissent, joined by Justice Rehnquist.

This holding was re-examined, in *Allied Bruce v. Terminix*, 513 U.S. 265 (1994), where a divided court re-affirmed the holding. The dissents set forth an exhaustive analysis of the Court's Commerce Clause jurisprudence, as well as a detailed study of the legislative history of the Federal Arbitration Act, demonstrating that the drafters of the Act never intended that it be applicable to actions in state courts. Perhaps the most telling factor is that the enforcement mechanism, set forth in 9 U.S.C.§§ 3 and 4, refers specifically to actions to take place ***in federal district court.*** *Id.* at 848 (Thomas, J., dissenting).

In re-iterating her position, Justice O'Connor made her position clear as to the legislative intent:

> "Yet over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation. See *Perry v. Thomas, supra*, at 493 (Stevens, J., dissenting) ('It is only in the last few years that the Court has effectively rewritten the statute to give it pre-emptive scope that Congress certainly did not intend').
>
> * * *

> Today's decision caps this Court's effort to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation.

Id. at 284 (O'Connor, J., concurring)

Justice Scalia, in dissenting in *Allied Bruce*, remarked: "I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time . . . . *Id.* at 285. (Scalia, J., dissenting).

As set forth below, the decision has become even *less* correct over time. It is respectfully requested that the Court accept Justice Scalia's invitation, and reverse the holding in *Southland*.

B. The Principle of *Stare Decisis* Should Not Preclude the Court From Re-Examining its Position.

1. *Stare Decisis* Should Not be Controlling When Earlier Decisions Were Erroneously Decided.

As set forth above, analysis of the legislative intent of the drafters of the FAA does not support the position set forth in *Southland*. As the Court stated in *Smith v. Albright*, 321 U.S. 649 (1944), the Court should not feel compelled to adhere to an erroneous position: "However, when convinced of former error, this Court has never felt constrained to follow precedent. . . . This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. *Id.* at 666.

2. *Southland* and Its Progeny Have Created Problems Both for the Courts and for Consumers, Such That *Stare Decisis* Should Not Control.

The Court is not required to adhere to precedent when the previous decision has proved problematic. As stated in *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), "We believe that considerations of *stare decisis* should not deter us from this course. Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."

The Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson* 513 U.S. 265 (1995), in re-affirming the holding in *Southland*, relied on the principle of *stare decisis*, and, without any supporting data, upon the propositions that (1) *Southland* is working just fine; and (2) that parties have likely relied on *Southland* in drafting their contracts, such that *Southland* should not be reversed:

> Nothing significant has changed in the past 10 years [since the decision in *Southland*]; no later cases have eroded *Southland*'s authority; and no unforeseen practical problems have arisen.[7] Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority.

Id. at 272. see also concurring opinion by Justice O'Connor: "Though wrong, *Southland* has not proved

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[7] The very fact that attorney-general from 20 states submitted amicus briefs supporting the reversal of *Southland*, a fact that is mentioned in the very same paragraph, seems to contradict this contention.

unworkable." *Id.* at 284.

Neither of these propositions are tenable. It is respectfully submitted that the Court should re-examine its holding in *Southland.*

i. Recent Developments Justify Re-Examining *Southland.*

It is respectfully submitted that the first proposition is not based on a realistic assessment of the practical impact of the decision, especially in regard to actions regarding contracts for purchases of new development homes. Furthermore, to the extent that it reflected the situation in 1995, developments since that time demonstrate that *Southland* has created practical problems for state courts seeking to reconcile *Southland* and later Supreme Court Commerce Clause decisions with state law provisions seeking to protect consumers [and in the case of California, specifically home purchasers] from the effects of adhesive, and, in many cases, unconscionable contracts drafted by agents of large businesses.

Specifically, at least three subsequent Court Commerce Clause decisions have created confusion in the state courts regarding the application of *Southland*: *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681.

The curious odyssey involved in the eventual decision in *Doctor's Associates* provides the clearest example of this confusion. First, the Montana Supreme Court held that a state law provision mandating certain notice requirements for an arbitration clause was unenforceable pursuant to the FAA, relying on *Volt Information Systems, Inc. v. Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989). The Supreme Court granted certiorari and remanded it back to the

state court for reconsideration in light of its decision in *Allied-Bruce*. *Doctor's Associates,* 515 U.S. 1129. The Montana Supreme Court reconsidered it in light of *Allied-Bruce* and *Volt Information Systems, Inc. v. Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989), but adhered to its previous decision, finding no preemption under the FAA. *Casarotto v. Lombardi,* 901 P.2d 596 (Mont. 1995). This led to the eventual return to the United State Supreme Court and the decision in *Doctor's Associates, supra,* 517 U.S. 681, holding that the notice provisions were invalid, as they were special requirements applicable to arbitration clauses only. *Id.* at 687.

Likewise, *Lopez* and *Morrison*, the first cases in over 60 years to invalidate a federal statute on Commerce Clause grounds, have added another wrinkle to state court analysis in trying to reconcile the appropriate standard to apply in deciding whether a particular contract "involves" interstate commerce. See discussion in *Basura v. U.S. Home Corp.* 98 Cal.App. 4th 1205, 1213, n. 8, comparing, *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W. 2d 716 (1997) (applying *Allied-Bruce* "commerce 'in fact'" test) and several other cases with *L & L Kempwood v. Omega Builders,* 972 S.W. 2d 819 (1998) "(holding *Allied Bruce's* 'affecting commerce' test did not survive *Lopez's* articulation of a 'substantially affecting' commerce test.)"

ii. Purported Reliance on *Southland* Does Not Justify Continued Adherence to This Decision.

The second proposition is that parties to contracts have relied on *Southland.* Regrettably, this is true. However, the reliance is one-sided. "Parties," consisting of defendant businesses, and in particular developers and sellers of new home development projects have

certainly relied on *Southland*, and mandatory alternative dispute mechanisms in drafting their contracts. Home buyers do not draft contracts. Nor do they generally have any meaningful ability to negotiate them. Examples of the adhesive nature of contracts involved in purchases of homes in development projects, and developers' multi-pronged attacks on homebuyers' rights to pursue their actions in a court of law are legion. As examples, just in California alone, see: *Villa Milano Homeowners Association v. Il Davorge*, 84 Cal.App. 4th 819 (2000) (attempt to enforce arbitration clause in Covenants, Conditions and Restrictions); *Pardee Construction Co. v. Superior Court*, 100 Cal.App. 4th 1081 (2002). (attempt to enforce clause requiring to judicial reference found to be unconscionable. The court commented that "at oral argument both counsel represented that significant portions of construction defect cases are already commonly sent to judicial reference." *Id.* at 1091.) The court found it significant that none of the potentially 800 sets of class members struck out the judicial reference section, finding that the developer, Pardee, had effectively admitted that they were contracts of adhesion. The court rejected Pardee's argument that plaintiffs "'can go elsewhere if they don't like it'" as "'fly[ing] 'in the face'of the uniqueness of a home.") *Id.* at 1087.

Southland and its progeny have not simplified matters for the state courts, at least in the context of construction defect cases. Now, rather than relying on state legislation designed to protect homebuyers, the courts, faced with persistent demands by corporate and business defendants to compel arbitration, are required to conduct fact intensive investigations into the conscionability of alternate dispute resolution provisions. See *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687. '[G]enerally applicable contract defenses, such as fraud, duress or unconsciousability, may be applied without

contravening § 2 [of the Federal Arbitration Act.]"

Furthermore, as Justice Scalia noted: "Abandoning [*Southland*] does not impair reliance interests to an extent that justifies this evil," noting that a remedy would be available through rescission, if it were a problem. *Allied-Bruce, supra,* 513 U.S. at 285 (Scalia, J., dissenting).

Any "reliance by the parties," thus, does not constitute ample justification for adhering to the faulty analysis of legislative intent set forth in *Southland.* It is respectfully submitted that it should be reversed.

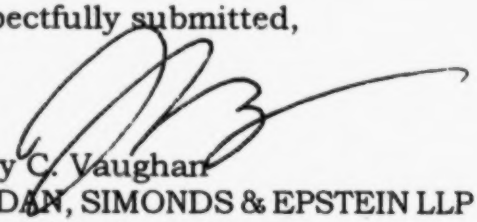
CONCLUSION

The Petition for Writ of Certiorari should be granted for two compelling reasons: First, to delineate the scope of the Commerce Clause as it relates to contractual action involving defects in new residential housing under the Court's emerging Commerce Clause jurisprudence. It is respectfully submitted that the Court should clarify that the provisions of the FAA are not applicable in these transactions, which involve scores of new home buyers nationwide and clarify that preemption under the provisions of the FAA is invalid in such application.

Second, it is also respectfully submitted that there are compelling reasons to re-examine *Southland Companies, Inc. v. Keating,* and reverse its holding as to application of the provisions of the FAA in state court actions.

For these, and the other foregoing reasons set forth, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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2600 Michelson Drive, Tenth Floor
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January 13, 2003

Supreme Court, U.S.
FILED

021403 JAN 14 2003

No. 03-___

IN THE

Supreme Court of the United States

Marvin and Lynn St. Germain, *et al.*,
Petitioners,

v.

U.S. Home Corporation

On Petition for a Writ of Certiorari
to the Supreme Court of California

APPENDIX

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January 13, 2003

INDEX TO APPENDIX

Document	Page
Order by California Supreme Court Denying Petition for Review	1a
Order by California Court of Appeals, Fourth District, Division Two, Denying Petition for Writ of Mandate or Prohibition	2a
Order by Superior Court on Motion to Compel Arbitration and Stay Action	3a
Cover Page and Table of Contents of Opposition to Motion to Compel Arbitration and Stay Action	8a
Cover Page and Table of Contents of Petition for Writ of Mandate	15a
Cover Page and Table of Contents of Petition for Review	23a
Relevant Constitutional and Statutory Provisions	29a

Court of Appeal, Fourth Appellate District, Division Two - No. E032255

S109766

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARVIN ST. GERMAIN JR. et al., Petitioners

v.

RIVERSIDE COUNTY SUPERIOR COURT, Respondent; U.S. HOME CORPORATION, Real Party in Interest.

Petition for review DENIED.

SUPREME COURT
FILED
OCT 16 2002
Frederick K. Ohirich Clerk

_____
Deputy

s/GEORGE
Chief Justice

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

FILED
AUG 29 2002
COURT OF APPEAL,
FOURTH DISTRICT

MARVIN ST. GERMAIN JR., et al.,

Petitioners

v.

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE,

Respondent;

U.S. HOME CORPORATION, et al.,

Real Parties in Interest

E032255

(Super.Ct.No. RIC362559)

The County of Riverside

THE COURT

The petition for writ of mandate/prohibition and request for stay is DENIED.

s/Richli
Acting P.J.

cc: See attached list

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FILED
Superior Court of
California
County of Riverside
JUL 13 2002

Attorneys for Defendants U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MARVIN JR. and LYNN ST. GERMAIN, individuals; CHARLES and MONICA STANSELL, individuals; SALVATORE and TULA COCO, individuals; et al.,	) CASE NUMBER 362559) Consolidated with) CASE NUMBER 368844)) ASSIGNED FOR ALL) PURPOSES TO:) JUDGE DALLAS SCOTT
Plaintiffs,	) HOLMES) DEPARTMENT 2
vs.	)
U.S. HOME CORPORATION, Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES -500 inclusive,	) ~~[PROPOSED]~~ ORDER) ON DEFENDANTS') MOTION TO COMPEL) ARBITRATION AND TO) STAY ACTION
Defendants.	)
CONSOLIDATED WITH	) Date: June 25, 2002) Time: 8:30 a.m.

	) Dept: 2
JOHN HINDS, an individual; NICOLE HINDS, an individual; JON HINDS, guardian ad litem for JASMINE HINDS a minor, et al.,	) Action Filed:August 13, 2001) Trial Date: None
Plaintiffs,	
vs.	
U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES 1-500, inclusive,	
Defendants.	

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT the Motion to Compel Arbitration and to Stay Action of Defendants U.S. Home Corporation and Lennar Corporation ("Moving Defendants") came on for hearing on June 25, 2002 at 8:30 a.m. in Department 2 of the above-entitled Court. Howard D. Hall and Matthew S. Buttacavoli appeared on behalf of Moving Defendants; Brian K. Stewart appeared on behalf of Defendants Geosoils and Bruce Keith; and Michael D. Turner and

Steven S. Hanagami appeared on behalf of Plaintiffs. After consideration of all the materials submitted and the oral argument of counsel,

IT IS HEREBY ORDERED THAT Moving Defendants' Motion is GRANTED.

THE COURT FINDS THAT

(1) Based on the Sales Agreements and the New Home Limited Warranty Booklet ("Warranty"), the "Original Purchaser Plaintiffs" agreed to arbitrate all of their disputes against Moving Defendants;

(2) The "Subsequent Purchaser Plaintiffs" are bound by the Warranty's arbitration clause and must arbitrate all of their disputes against Moving Defendants because they are third party beneficiaries of the Warranty and have claimed the benefits of the Warranty and are thus bound by its obligations;

(3) Those Plaintiffs that are "minors" or "tenants" do not have standing to assert claims against Moving Defendants are are nevertheless

bound by the Warranty's arbitration clause and must arbitrate all of their disputes against Moving Defendants because they have claimed the benefits of the Warranty and are thus bound by its obligations;

(4) The Federal Arbitration Act ("FAA") is controlling and inconsistent California statutes are preempted;

(5) *Volt Information Systems, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468 is not on point because the parties in that case expressly chose to arbitrate their claims under California law notwithstanding the applicability of the FAA. In this case, the FAA is applicable but the subject parties did not agree to arbitrate under California law, rather they expressly agreed to arbitrate pursuant to the FAA;

(6) The arbitration clauses at issue are not unconsciousable; and

(7) The arbitration clauses at issue are

sufficiently broad to include both contract and tort causes of action.

IT IS FURTHER ORDERED THAT this matter is stayed pending completion of arbitration and is set for a ~~nonappearance~~ status ~~report~~ conference on December 19, 2002.

IT IS SO ORDERED.

DATED: Jul 13 2002

s/DALLAS HOLMES, JUDGE
JUDGE OF THE
SUPERIOR COURT

Michael D. Turner, State Bar No. 126455
Steven S. Hanagami, State Bar No. 165093
KASDAN, SIMONDS & EPSTEIN LLP
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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

MARVIN JR. and LYNN ST. GERMAIN, individuals; CHARLES and MONICA STANSELL, individuals; SALVATORE and TULA COCO, individuals; MARIAN and MARIA OLESKY, individuals; WAYNE and DIANNA MARTIN, individuals; SAUNDRA DENDY, an individual; LAWRENCE and DENA BROWN, individuals, ANTHONY and VICKI BONOFIGLIO, individuals; KEITH and PENNY DAVIS, individuals; JOHN and YOLANDA FULLINWIDER, individuals; KEVIN TIERNEY and CAMILLE REINEKE, individuals; ALBERTO and VICTORIA GARCIA, individuals; GARY and CYNDA JERGER, individuals; ASSADOR and VALENTINE FARAJIAN, individuals; SUZY FARAJIAN, an individual; ASSADOR	) Lead Case No. RIC 362559) Action Filed: August 13, 2001) Consolidated with Case No. RIC 368844)) Hearing:) Date: June 25, 2002) Time: 8:30 A.M.) Dept.: 2) Judge: Hon. Dallas S. Holmes)) PLAINTIFFS' OPPOSITION TO U.S. HOME CORPORATION'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION)

FARAJIAN, as Guardian ad litem for ARPY FARAJIAN, a minor; ROBERT VERGURA, an individual; AMY WORKMAN, an individual; MICHAEL BROWN, an individual; DENA BROWN, as guardian ad litem for DAVID BROWN, a minor; MONICA STANSELL, as guardian ad litem for MONIQUE STANSELL, a minor; MONICA STANSELL, as guardian ad litem for CHANEL STANSELL, a minor; VICTORIA GARCIA, Guardian ad litem for CHRISTIAN GARCIA, a minor; NOURIT VERGURA, an individual; ROBERT VERGURA, as guardian ad litem for NOAH VERGURA, a minor; ROBERT VERGURA, as guardian ad litem for CHANELLE VERGURA, a minor; PATRICIA McLAUGHLIN, an individual; Plaintiffs, vs. U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES 1-500, inclusive, Defendants, JON HINDS, an individual; NICOLE HINDS, an individual;	[Filed concurrently with Plaintiffs' Exhibits in Support of Their Opposition to U.S. Home Corporation's Motion to Compel Arbitration, Declarations of Steven Hanagami, Mark Neely, Larry Brown and Robert Leszkiewicz in Support Thereof, Stipulation to Allow Plaintiffs to File Their Opposition to U.S. Home Corporation's Motion to Compel Arbitration On or Before June 14, 2002, and Plaintiffs' Objection to Evidence Contained in the Declarations of Randy Schroeder and Alison short in support of U.S. Home Corporation's Motion to Compel Arbitration] Trial Date: None

JON HINDS, guardian ad litem for JASMINE HINDS, a minor; JON HINDS, guardian ad litem for SIMONE HINDS, a minor; JON HINDS, guardian ad litem for DOMINIQUE HINDS, a minor; DEBORAH LESZKIEWICZ, an individual; ROBERT LESZKIEWICZ, an individual; DEBORAH LESZKIEWICZ, guardian ad litem for JON PHILLIP COMOUCHE, a minor; DEBORAH LESZKIEWICZ, guardian ad litem for PAOLENA COMOUCHE, a minor;	Set Related Case No. RIC 368844 Filed: December 24, 2001 Trial Date: None Set

Plaintiffs,

vs.

U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES 1-500, inclusive,

Defendants.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs hereby submit their Memorandum of Points and Authorities in Opposition to the Motion to Compel Arbitration and To Stay Action brought by

U.S. Home Corporation.

Respectfully submitted,

DATED: June 14, 2002

KASDAN, SIMONDS & EPSTEIN LLP

By: s/Michael D. Turner

TABLE OF CONTENTS

PAGE

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT 1

I. STATEMENT OF FACTS 1

A. Parties Plaintiff 1

B. Parties Defendant 2

II. THE SUBJECT DISPUTE DOES NOT INVOKE THE INTERSTATE COMMERCE CLAUSE 2

III. STATE STATUTES MAY AFFORD THE CONSUMER GREATER PROTECTIONS WHERE THERE ARE COMPETING FEDERAL STATUTES 5

IV. THE COURT CANNOT COMPEL THOSE PLAINTIFFS WHO ARE NOT SIGNATORIES TO THE AGREEMENT, TO ARBITRATION 6

A. 17 Plaintiffs Are Either Minors or Residents Who Are Not Subject to Arbitration 6

B. Subsequent Purchasers Are Not Subject to the Arbitration Clause since the Limited Warranty Specifically Excludes the Issues Which Are the Subject of the Complaint 6

C. Even If the Subsequent Purchasers Plaintiffs Are Construed as Parties Subject to the Arbitration Clause, the Limited Warranty Specifically Excludes the Issues Which Are the Subject of the Complaint 7

D. The United States Supreme Court Allows California Trial Courts to Stay Federal Arbitration Pending Resolution of The State Court Actions 8

VI. THE COURT SHOULD NOT COMPEL THOSE PLAINTIFFS WHO ARE SIGNATORIES OF THE SALES AGREEMENT TO CONTRACTUAL ARBITRATION 8

A. The Court Must Interpret the Sales Agreement Under State Law to Determine Whether the Parties Effectively Agreed to Arbitration 8

B. The Sales Agreement Specifically Excludes the Issues Which U.S. Home Corporation Seeks to Arbitrate 8

C. An Ambiguous Arbitration Clause Must be Construed Against the Drafter, Especially Where There is an Alleged Waiver of Rights ... 9

VI. FRAUD AND UNCONSCIONABILITY PROVIDE A BAR TO COMPELLED ARBITATION 10

A. The Arbitration Clause in the Sales Agreement was Fraudulently Induced 10

B. The Court May Revoke the Arbitration Clause as Unconscionable 11

(i) The Arbitration Clause is Procedurally Unconscionable 11

(ii) The Arbitration Clause is Substantively Unconscionable 11

(iii) The Arbitration Clause is Unconscionable *Per Se* as to the Subsequent Purchasers 14

VII. THE COURT SHOULD REFUSE TO COMPEL ARBITRATION TO AVOID INCONSISTENT RESULTS AS TO THE NUMEROUS DEFENDANTS WHO ARE NOT SUBJECT TO CONTRACTUAL ARBITRATION 13

VIII. U.S. HOME FAILS TO ESTABLISH ALL CONDITIONS PRECEDENT TO ARBITRATION 15

IX. CONCLUSION 16

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

MARVIN JR. and LYNN ST. GERMAIN, individuals; CHARLES and MONICA STANSELL, individuals; SALVATORE and TULA COCO, individuals; MARIAN and MARIA OLESKY, individuals; WAYNE and DIANNA MARTIN, individuals; SAUNDRA DENDY, an individual; LAWRENCE and DENA BROWN, individuals, ANTHONY and VICKI BONOFIGLIO, individuals; KEITH and PENNY DAVIS, individuals; JOHN and YOLANDA FULLINWIDER, individuals; KEVIN TIERNEY and CAMILLE REINEKE, individuals; ALBERTO and VICTORIA GARCIA, individuals; GARY and CYNDA JERGER, individuals; ASSADOR and VALENTINE	) CIVIL NO. _____)) (Riverside) County) Superior Court) Lead Case No.) RIC 362559) consolidated) with) Case Nos. RIC) 368844))) Assigned to) Hon. Dallas S.) Holmes) Riverside) Superior Court) Department 2

FARAJIAN, individuals; SUZY FARAJIAN, an individual; ASSADOR FARAJIAN, as Guardian ad litem for ARPY FARAJIAN, a minor; ROBERT VERGURA, an individual; AMY WORKMAN, an individual; MICHAEL BROWN, an individual; DENA BROWN, as guardian ad litem for DAVID BROWN, a minor; MONICA STANSELL, as guardian ad litem for MONIQUE STANSELL, a minor; MONICA STANSELL, as guardian ad litem for CHANEL STANSELL, a minor; VICTORIA GARCIA, Guardian ad litem for CHRISTIAN GARCIA, a minor; NOURIT VERGURA, an individual; ROBERT VERGURA, as guardian ad litem for NOAH VERGURA, a minor; ROBERT VERGURA, as guardian ad litem for CHANELLE VERGURA, a minor; PATRICIA

McLAUGHLIN, an individual,

Plaintiffs and Petitioners,

vs.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE,

Respondent;

U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation,

Real Parties in Interest.

CONSOLIDATED WITH:

JON HINDS, an individual; NICOLE HINDS, an individual; JON HINDS, guardian ad litem for JASMINE HINDS, a minor; JON HINDS, guardian ad litem for SIMONE HINDS, a minor; JON

HINDS, guardian ad litem for DOMINIQUE HINDS, a minor; DEBORAH LESZKIEWICZ, an individual; ROBERT LESZKIEWICZ, an individual; DEBORAH LESZKIEWICZ, guardian ad litem for JON PHILLIP COMOUCHE, a minor; DEBORAH LESKIEWICZ, guardian ad litem for PAOLENA CAMOUCHE, a minor; RICHARD HENDERSON, an individual; and NANCY HENDERSON, an individual,

Plaintiffs,

vs.

U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES 1-500, inclusive,

Defendants.

IMMEDIATE RELIEF REQUESTED

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF AND REQUEST FOR STAY OF PETITIONER DEPOSITIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND VERIFICATION

(APPENDIX OF RECORD FILED SEPARATELY)

On Appeal from the Judgment of the Superior Court

of the State of California for the County of Riverside

The Honorable Dallas S. Holmes

KASDAN, SIMONDS & EPSTEIN
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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES CITED	iii
INTRODUCTION	1
1. Nature of the Case	1
2. Issues Presented	2
3. Extraordinary Relief is Warranted.	2
A. Petitioners are Being Forced to Give Up Their Rights to Trial by Jury and Right of Appeal	2
B. Petitioners Should Not be Compelled to Arbitrate This Matter	3
PETITION	3
VERIFICATION	7
MEMORANDUM OF POINTS AND AUTHORITIES	8
1. A Writ of Mandamus is Proper When Arbitration is Compelled By The Court	8
2. Summary of Issued Raised By U.S. Home	8
3. The Court Should Have Denied The Motion To Compel In Order To Avoid Inconsistent Results As To The Numerous Defendants Who Are Not	9

Subject To Contractual Arbitration Pursuant to *Volt v. Trustees of Leland Stanford Jr. University*

4. The Subject Dispute Does Not Invoke Interstate Commerce Clause 14

5. The Court Should Not Have Compelled Those Plaintiffs To Arbitrate Who Are Not Signatories To The Agreement To Arbitration 18

   A. Seventeen Plaintiffs Are Either Minors or Residents Who Are Not Subject to Arbitration 19

   B. Subsequent Purchasers Are Not Subject To The Arbitration Clause Since the Limited Warranty Specifically Excludes The Issues Which Are Subject of The Complaint 19

   C. Even If The Subsequent Purchaser Plaintiffs Are Construed As Parties Subject to The Arbitration Clause, the Limited Warranty Specifically Excludes the Issues Which Are the Subject of The Complaint 19

6. The Court Erred In Failing To Revoke The Arbitration Clause As An Adhesion Contract And As Unconscionable 20

   A. Since General State Law Provisions Are Not Preempted By The FAA, Courts May Find 20

Arbitration Clauses Void As Unconscionable

B. This Was a Contract of Adhesion 21

(i) The Arbitration Clause is Procedurally Unconscionable 21

(ii) The Arbitration Clause is Substantively Unconscionable 22

(iii) The Arbitration Clause is Unconscionable *Per Se* as to The Subsequent Purchasers 24

7. Conclusion 24

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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individual,)

Plaintiffs and Petitioners,
vs.

U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation,

Defendants and Respondents

CONSOLIDATED WITH:

JON HINDS, an individual; NICOLE HINDS, an individual; JON HINDS, guardian ad litem for JASMINE HINDS, a minor; JON HINDS, guardian ad litem for SIMONE HINDS, a minor; JON HINDS, guardian ad litem for DOMINIQUE HINDS, a minor; DEBORAH LESZKIEWICZ, an individual; ROBERT LESZKIEWICZ, an individual; DEBORAH LESZKIEWICZ, guardian ad litem for JON PHILLIP

COMOUCHE, a minor; DEBORAH LESKIEWICZ, guardian ad litem for PAOLENA CAMOUCHE, a minor; RICHARD HENDERSON, an individual; and NANCY HENDERSON, an individual,

Plaintiffs,

vs.

U.S. HOME CORPORATION, a Delaware corporation; LENNAR CORPORATION, a Delaware corporation; and DOES 1-500, inclusive,

Defendants.

PETITION FOR SUPREME COURT REVIEW

On Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

The Honorable Dallas S. Holmes

RELATED APPEAL PENDING:
Basura v. U.S. Home
Supreme Court Case No. S108217

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES CITED	ii
1. Issues Presented	1
A. Whether California law relating to arbitration is preempted under the Federal Arbitration Act ("FAA") when sales agreements include an arbitration clause and choice of law provision that references the FAA and California law.	1
B. Whether litigation involving construction defects in homes, which are primarily used for residential purposes, invoke the Commerce Clause.	1
C. Whether the arbitration clauses at issue in this matter are unconscionable.	1
D. Whether consumers and minors who are not signatories to sales agreements should be compelled to arbitrate their disputes.	1
2. Why Review Should be Granted	1
3. Related Case and Introduction	4
4. Conclusion	5

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, § 8, cl. 3 of the Constitution provides that "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Other relevant provisions of Federal and California law are set forth in the Appendix at Exhibit F.

9 U.S.C.§ 2 provides: A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save as upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.§ 3 provides: **Stay of proceedings where issue therein referable to arbitration.**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such

arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.§ 4 provides: **Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, safe for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial

thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

28 U.S.C. 844(i) provides: Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death

results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

California *Business and Professions Code* sect0ion 5510 provides: **Existence of board of architectural examiners**

There is in the Department of Consumer Affairs a California State Board of Architectural Examiners which consists of 10 members.

California *Business and Professions Code* section 5536 provides: **Practice without license or holding self out as architect; misdemeanor; registered building designer**

(a) It is a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, for any person who is not licensed to practice architecture under this chapter, to practice architecture in this state or to use any term confusingly similar to the word architect, or to advertise or put out any sign or card or other device which might indicate to the public that he or she is an architect or that he or she is qualified to engage in the practice of architecture or is an architectural engineer.

(b) It is a misdemeanor, punishable as specified in subdivision (a), for any person to advertise or represent that he or she is a

"registered building designer" or is registered or otherwise licensed by the state as a building designer.

California *Business and Professions Code* section 6710 provides: **Existence of board of registration for professional engineers and land surveyors**

(a) There is in the Department of Consumer Affairs a Board for Professional Engineers and Land Surveyors, which consists of 13 members.

(b) Any reference in any law or regulation to the Board of Registration for Professional Engineers and Land Surveyors is deemed to refer to the Board for Professional Engineers and Land Surveyors.

California *Business and Professions Code* section 7000.5 provides: **Contractors' state license board; existence; membership**

There is in the Department of Consumer Affairs a Contractors' State License Board, which consists of 13 members.

California *Business and Professions Code* section 7028 provides: **Contracting without license; second and subsequent offenses; limitation of actions**

(a) It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, unless such person is particularly exempted from the provisions of this chapter.

(b) If such person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

(c) In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this section means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(d) Notwithstanding any other provision of law to the contrary, an indictment for any violation of this section by the unlicensed contractor shall be found or an information or complaint filed within four years from the date of the contract proposal, contract, completion, or abandonment of the work, whichever occurs last.

California *Code of Civil Procedure* section 1298.7 provides: In the event an arbitration provision is included in a contract or agreement covered by this title, it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable.

California *Code of Civil Procedure* section 337.1 provides in pertinent part:

Four years; actions for damages from persons performing or furnishing design, specifications, surveying, planning, supervision or observation of construction or construction of improvement to realty

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property.

California *Code of Civil Procedure* section 337.15 provides in pertinent part:

Ten years; developer, contractor, architect, etc. of real property; latent deficiency in design, supervision, etc.; injury to property

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

California *Code of Civil Procedure* section 1281.2 provides: **Order to arbitrate controversy; petition; determination of court**

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an

agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

California *Health and Safety Code* section 17921(a) provides: **Building standards; rules and regulations**

Except as provided in subdivision (b), the department shall propose the adoption, amendment, or repeal of building standards to the California Building Standards Commission pursuant to the provisions of Chapter 4 (commencing with Section 18935) of Part 2.5, and the department shall adopt, amend, and repeal other rules and regulations for the protection of the public health, safety, and general welfare of the occupant and the public governing the erection, construction, enlargement, conversion, alternation, repair, moving, removal, demolition, occupancy, use, height, court, area, sanitation, ventilation and maintenance of all hotels, motels, lodging houses, apartment houses, and dwellings, and buildings and structures accessory thereto. Except as otherwise provided in this part, the department shall enforce those building standards and those other rules and regulations. The other rules and regulations adopted by the department may include a schedule of fees to pay the cost of enforcement by the department under Sections 17952 and 19765.

California *Health and Safety Code* section 17957 provides: **Alternate procedure.**

The governing body of any city, county, or city and county may enact an ordinance prescribing an alternate procedure which is equal to or more restrictive than the procedure specified in Sections 17953, 17954, and 17955.

California *Health and Safety Code* section 17995 provides: **Misdemeanor; punishment.**

Any person who violates any of the provisions of this part, the building standards published in the State Building Standards Code relating to the provisions of this part, or any other rule or regulation promulgated pursuant to the provisions of this part is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment not exceeding six months, or by both such fine and imprisonment.

California *Health and Safety Code* section 17995.1 provides: **Second or subsequent violations; penalties**

Any person who is convicted pursuant to Section 17995 for a second or subsequent time within a five-year period for violations at the same property shall be punishable by a fine not to exceed five thousand dollars ($5,000) or by imprisonment not exceeding six months, or both such fine and imprisonment.

California *Health and Safety Code* section 19825 provides: **Declarations; form; contractor list.**

(a) Every city or county that requires the issuance of a permit as a condition precedent to the construction, alteration, improvement, demolition, or repair of any building or structure shall, in addition to any other requirements, require the following declarations in substantially the following form upon the issuance of any building permit:

BUILDING PROJECT IDENTIFICATION

Applicant's Mailing Address ----------
Address of Building ----------
Owner's Name if Known ----------
Telephone No. ----------
Contractor's Name ----------
Contractor's Mailing Address ----------
Lic. No. ----------
Architect or Engineer ----------
Architect's or Engineer's Address ----------
Lic. No. ----------
In addition the city or county may require that there be included, in the building project identification portion of a building permit, the following:
Assessor's Parcel Number* ----------
Permit Date ----------
Permit Number ----------
Description of Work ----------
Building Permit Valuation ----------

*To be entered by issuing agency.

LICENSED CONTRACTOR'S DECLARATION

I hereby affirm under penalty of perjury that I am licensed under provisions of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, and my license is in full force and effect.
License Class ---------- Lic. No. ----------
Date ---------- --------- Contractor ----------

OWNER-BUILDER DECLARATION

I hereby affirm under penalty of perjury that I am exempt from the Contractors' State License

Law for the following reason (Sec. 7031.5, Business and Professions Code: Any city or county that requires a permit to construct, alter, improve, demolish, or repair any structure, prior to its issuance, also requires the applicant for the permit to file a signed statement that he or she is licensed pursuant to the provisions of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code) or that he or she is exempt therefrom and the basis for the alleged exemption. Any violation of Section 7031.5 by any applicant for a permit subjects the applicant to a civil penalty of not more than five hundred dollars ($ 500).):

– I, as owner of the property, or my employees with wages as their sole compensation, will do the work, and the structure is not intended or offered for sale (Sec. 7044, Business and Professions Code: The Contractors' State License Law does not apply to an owner of property who builds or improves thereon, and who does the work himself or herself or through his or her own employees, provided that the improvements are not intended or offered for sale. If, however, the building or improvement is sold within one year of completion, the owner-builder will have the burden of proving that he or she did not build or improve for the purpose of sale.).

-- I, as owner of the property, am exclusively contracting with licensed contractors to construct the project (Sec. 7044, Business and Professions Code: The Contractors' State License Law does not apply to an owner of property who builds or improves thereon, and

who contracts for the projects with a contractor(s) licensed pursuant to the Contractors' State License Law.).
-- I am exempt under Sec. --------, B.& P.C. for this reason ----------

Date ---------- Owner ----------

WORKERS' COMPENSATION DECLARATION

I hereby affirm under penalty of perjury one of the following declarations:

------ I have and will maintain a certificate of consent to self-insure for workers' compensation, as provided for by Section 3700 of the Labor Code, for the performance of the work for which this permit is issued.

------ I have and will maintain workers' compensation insurance, as required by Section 3700 of the Labor Code, for the performance of the work for which this permit is issued. My workers' compensation insurance carrier and policy number are:
Carrier ----------
Policy Number ----------

(This section need not be completed if the permit is for one hundred dollars ($100) or less).

------ I certify that, in the performance of the work for which this permit is issued, I shall not employ any person in any manner so as to become subject to the workers' compensation laws of California, and agree that, if I should become subject to the workers' compensation

provisions of Section 3700 of the Labor Code, I shall forthwith comply with those provisions.

Date: ---------- Applicant: ----------

WARNING: FAILURE TO SECURE WORKERS' COMPENSATION COVERAGE IS UNLAWFUL, AND SHALL SUBJECT AN EMPLOYER TO CRIMINAL PENALTIES AND CIVIL FINES UP TO ONE HUNDRED THOUSAND DOLLARS ($ 100,000), IN ADDITION TO THE COST OF COMPENSATION, DAMAGES AS PROVIDED FOR IN SECTION 3706 OF THE LABOR CODE, INTEREST, AND ATTORNEY'S FEES.

CONSTRUCTION LENDING AGENCY

I hereby affirm under penalty of perjury that there is a construction lending agency for the performance of the work for which this permit is issued (Sec. 3097, Civ. C.).
Lender's Name ----------
Lender's Address ----------

I certify that I have read this application and state that the above information is correct. I agree to comply with all city and county ordinances and state laws relating to building construction, and hereby authorize representatives of this county to enter upon the above-mentioned property for inspection purposes.

Signature of Applicant or Agent Date

(b) The Contractors' State License Board shall provide semiannually, upon the request of city, county, and city and county building

departments, a list of all contractors that did not secure payment of compensation in accordance with Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4 of the Labor Code during any period for which workers were employed during the preceding six months.

California *Business and Professions Code* section 19826 provides: **Properly executed declarations; necessary contents of permit, accuracy; certificate copies; disposition**

(a) No city or county, whether general law or chartered, shall issue a building permit which does not contain all applicable declarations required by Section 19825 properly executed by the owner, applicant, contractor, or agent of the owner, contractor, or applicant. The properly executed declarations shall be a condition for issuance of the building permit. A properly executed declaration may include a declaration signed and transmitted by facsimile or other electronic means., However, no city or county or its employees shall be responsible for determining the truth or accuracy of the declarations, and no monetary liability on the part of, and no cause of action for damages against them, shall arise from their failure to verify the truth or accuracy of the declarations.

(b) A city or county may require that within 15 days of issuance, the issuing agency of the city or county deliver copies of all building permits to the assessor of the county.

(c) For purposes of this section, an "application for a building permit" shall be construed as a "transaction: and all declarations

required shall be construed as "records" under Title 2.5 (commencing with Section 1633.1) of Part 2 of Division 3 of the *Civil Code*.

California *Health and Safety Code* section 19835 provides: **Security for building permit; forms satisfying local requirements**

Whenever a local ordinance authorizes or requires the furnishing of security in connection with the performance of any act or agreement required as a condition for the issuance of a building permit, the building permit applicant may provide any of the following as such security:

(a) A deposit, either with the local agency or a responsible escrow agent or trust company, at the option of the local agency, of money or negotiable bonds of the kind approved for securing deposits of public moneys.

(b) An instrument of credit from one or more financial institutions subject to regulation by the state or federal government and pledging that the funds necessary to carry out the act or agreement are on deposit and guaranteed for payment or a letter of credit issued by such a financial institution.

(c) Bond or bonds by one or more duly authorized corporate sureties.

(d) Any form of security which is acceptable to the local agency and specified by ordinance thereof.

Supreme Court, U.S.
FILED
APR 23 2003
CLERK

No. 02-1403

In The

Supreme Court of the United States

MARVIN AND LYNN ST. GERMAIN, et al.,

Petitioners,

v.

U.S. HOME CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 Respondent U.S. Home Corporation makes the following corporate disclosure: Lennar Corporation is the parent corporation of U.S. Home Corporation. No other publicly held company owns 10% or more of U.S. Home Corporation's stock.

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	The Petition for Writ of Certiorari Should Be Denied Because It Is Premature	1
III.	Conclusion	5

TABLE OF AUTHORITIES

CASES

Atlas Plastering Inc. v. Superior Court, 140 Cal.Rptr. 59 (Cal.Ct.App. 1977) 2

Gordon v. G.R.O.U.P., Inc., 56 Cal.Rptr.2d 914 (Cal.Ct.App. 1996) 2, 4

Hoversten v. Superior Court, 88 Cal.Rptr.2d 197 (Cal.Ct.App. 1998) 4

Hoyga v. Superior Court, 142 Cal.Rptr. 325 (Cal.Ct.App. 1997) 3

Kowis v. Howard, 838 P.2d 250 (Cal. 1992) 3, 4

La Pietra v. Freed, 151 Cal.Rptr. 554 (Cal.Ct.App. 1978) 2

Oceanside Union School Dist. v. Superior Court, 373 P.2d 439 (Cal. 1962) 3

Omaha Indem. Co. v. Superior Court, 258 Cal.Rptr. 66 (Cal.Ct.App. 1989) 3

Pierce County, Washington v. Guillen, ___ U.S. ___, 123 S.Ct. 720, 154 L.Ed.2d 610 (Jan. 2003) 5

Premium Comm'l Services Corp. v. National Bank of Calif., 86 Cal.Rptr.2d 65 (Cal.Ct.App. 1999) 3

State Farm Fire & Cas. v. Hardin, 259 Cal.Rptr. 433 (Cal.Ct.App. 1989) 2, 4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

CAL. CONST. art. VI, § 3 2

CAL. CONST. art. VI, § 4 1

CAL. CONST. art. VI, § 10 1

CAL. CONST. art. VI, § 11 2

STATUTES

28 U.S.C. § 1257 ..... 1, 5

CAL. CIV. PROC. CODE § 904.1(a) 2

CAL. CIV. PROC. CODE § 906 2

CAL. CIV. PROC. CODE § 1085 2

CAL. CIV. PROC. CODE § 1294 ..... 2, 4

CAL. CIV. PROC. CODE § 1294.2 2

OTHER AUTHORITIES

SUP. CT. R. 10 2

CAL. R. CT. 28 2

CAL. R. CT. 28(b) 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice William H. Rehnquist and the Honorable Justices of the Supreme Court of the United States:

Respondent U.S. Home Corporation ("U.S. Home") respectfully submits the following Brief in Opposition to Marvin and Lynn St. Germain, *et. al.*'s ("Petitioners") Petition for Writ of Certiorari:

I. Introduction

The Petition for Writ of Certiorari should be denied because the Supreme Court lacks jurisdiction under 28 U.S.C. § 1257. Neither the California Supreme Court nor the lower appellate court issued a final judgment on a federal issue. Neither court framed or decided any of the questions that Petitioners argue. Petitioners request direct review in the United States Supreme Court of a decision of a California trial court. California's intermediate appellate court merely decided that review at this stage of the case is premature, and the California Supreme Court declined to intervene. Federal intervention, therefore, is also premature.

II. The Petition for Writ of Certiorari Should Be Denied Because It Is Premature

On motion of U.S. Home, the Superior Court of California ordered Petitioners to arbitrate certain claims. Appendix ("App.") 3a-7a. The Superior Court is California's trial court of general jurisdiction. *See* CAL. CONST. art. VI, §§ 4, 10. Petitioners sought appellate review of the

order by petitioning for a writ of mandate in the California Court of Appeal. App. 15a-22a. The Court of Appeal is California's intermediate appellate court. *See* CAL. CONST. art. VI, §§ 3, 11; CAL. CIV. PROC. CODE § 904.1(a). That court summarily denied the petition for writ of mandate. App. 2a. Petitioners sought review in the California Supreme Court. App. 23a-28a. The California Supreme Court reviews civil cases only in its discretion. *See* CAL. R. CT. 28. In exercising discretion, it applies criteria similar to those applied to petitions for certiorari. *Compare id.* at 28(b) (setting forth grounds for review by California Supreme Court) *with* SUP. CT. R. 10 (indicating the character of the "compelling reasons" required for review on a writ of certiorari). The California Supreme Court denied the petition for review. App. 1a.

An order compelling arbitration is not directly appealable under California law. *See* CAL. CIV. PROC. CODE §§ 1294, 1294.2; *Gordon v. G.R.O.U.P., Inc.*, 56 Cal.Rptr.2d 914, 918 n. 8 (Cal.Ct.App. 1996) *citing State Farm Fire & Cas. v. Hardin*, 259 Cal.Rptr. 433, 435-36 (Cal.Ct.App. 1989). The order compelling arbitration is, however, reviewable on appeal from the judgment entered on the arbitration award. *See* CAL. CIV. PROC. CODE § 906; *La Pietra v. Freed*, 151 Cal.Rptr. 554, 557 (Cal.Ct.App. 1978); *see also Atlas Plastering Inc. v. Superior Court*, 140 Cal.Rptr. 59, 61 (Cal.Ct.App. 1977) (preferred procedure following order compelling arbitration is to proceed with arbitration and "attack confirmation on appeal").

A party claiming to be aggrieved by a Superior Court order that is not directly appealable may petition the Court of Appeal for an extraordinary writ. *See* CAL. CIV. PROC. CODE § 1085. To persuade the Court of Appeal to consider the merits of the case, the petitioner must first

show that it has no adequate remedy by appeal and that it will suffer irreparable harm. *See Hoyga v. Superior Court*, 142 Cal.Rptr. 325, 329-30 (Cal.Ct.App. 1997). "A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law." *Omaha Indem. Co. v. Superior Court*, 258 Cal.Rptr. 66, 67 (Cal.Ct.App. 1989). Unless the California Legislature has made a writ proceeding the exclusive means of reviewing a class of order, in the vast majority of cases "the parties must be relegated to a review of the order on appeal from the final judgment." *Oceanside Union School Dist. v. Superior Court,* 373 P.2d 439, 442 n. 4 (Cal. 1962); *see also Premium Comm'l Services Corp. v. National Bank of Calif.*, 86 Cal.Rptr.2d 65, 68-69 (Cal.Ct.App. 1999) (explaining why extraordinary writs are rarely granted). In California, ninety percent of writ petitions are denied. *See Premium Comm'l*, 86 Cal.Rptr.2d at 68 *quoting Omaha Indem. Co.*, 258 Cal.Rptr. at 68.

When the California Court of Appeal finds that a petition does not meet the criteria for immediate review, it denies the petition summarily. *See Kowis v. Howard*, 838 P.2d 250, 252 (Cal. 1992).[1] Summary denial of a writ petition does not create law of the case, support issue preclusion, or otherwise impair the petitioner's right to demand review of the merits of the challenged order on

[1] If the petition meets the threshold criteria, however, the Court of Appeal either may issue an order for the case to proceed or, in rare cases, may grant peremptory relief in the first instance. *See id.* In either circumstance, the case becomes a "cause" under the California Constitution, and the Court of Appeal must decide it in a reasoned, written opinion. *See id.*

direct appeal from the later judgment. *See Kowis*, 838 P.2d at 253; *Hoversten v. Superior Court*, 88 Cal.Rptr.2d 197, 200 (Cal.Ct.App. 1998). That is because summary denial signals only that (1) the petitioner failed to convince the Court of Appeal that an issue should be decided immediately; and (2) the appellate court has not given the merits full review. *See Kowis*, 838 P.2d at 253, 256.

As Petitioners' Appendix accurately reflects, the Court of Appeal summarily denied their petition for a writ of mandate, and the California Supreme Court exercised its discretion not to review the case. This means no California appellate court considered the first two questions in the Petition for Writ of Certiorari, and no decision of a California appellate court frames the third question. Petitioners remain free to appeal the judgment that will be entered after arbitration. *See* CAL. CIV. PROC. CODE § 1294. In that appeal, they can challenge the order compelling arbitration on the grounds they now argue. *See Kowis*, 838 P.2d at 253; *Gordon*, 56 Cal.Rptr.2d at 918 n. 8; *State Farm*, 259 Cal.Rptr. at 435-36.

In the end, Petitioners seek United States Supreme Court examination of the California Court of Appeal's decision not to engage in discretionary interlocutory appellate review.[2] How state courts regulate the timing of

[2] Petitioners misstate the legal effect of the California Supreme Court's denial of their petition for review. Petitioners assert that "[t]he California Supreme Court decided, by denying petition for review, that [sales of newly constructed single family homes] do involve interstate commerce,. . . . " Pet. 5. By denying the petition for review, however, the California Supreme Court merely left untouched the California Court of Appeal's decision not to engage in discretionary interlocutory appellate review.

appellate review in ordinary civil actions, however, raises no federal question. Considering the merits of Petitioners' questions is therefore premature, so much so that this Court lacks jurisdiction. *See* 28 U.S.C. § 1257; *Pierce County, Washington v. Guillen*, ___ U.S. ___, 123 S.Ct. 720, 728, 154 L.Ed.2d 610, 623 (Jan. 2003) and cases there cited. This case lacks a final judgment by California's highest court on Petitioners' purported federal issues.

III. Conclusion

For the reasons set forth in this Brief in Opposition, Respondent U.S. Home Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Marvin and Lynn St. Germain, *et al.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

Marvin and Lynn St. Germain, *et al.*,
Petitioners,

v.

U.S. Home Corporation

On Petition for a Writ of Certiorari
to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12 1/2

TABLE OF CONTENTS

		Pages
I.	INTRODUCTION	1
II.	HOME BUYERS HAVE BEEN DENIED DUE PROCESS AND THEIR RIGHTS UNDER CALIFORNIA LAW	2-4
III.	THE COURT SHOULD EXERCISE ITS AUTHORITY TO REVIEW THE MATTER AT THIS STAGE OF THE PROCEEDINGS	4
IV.	CONCLUSION	7

TABLE OF AUTHORITIES

Cases **Pages**

Allied-Bruce Terminix Companies, Inc. v. Dobson
513 U.S. 1 (1994) 4

Cohen v. Beneficial Industrial Loan Corp.
337 U.S. 541, 546 (1949) 5

Connor v. Great Western Sav. & Loan Assn.
69 Cal.2d 850, 867 (1968) 3

Cox Broadcasting Corp. v. Cohn
420 U.S. 469, 479 (1975) 4

Crouchman v. Superior Court
45 Cal.3d 1167, 1173 (1988) 2

Franchise Tax Board of California v. Hyatt
___ U.S. ___ 1233 S. Ct. 409, 154
L.Ed. 2d 289 (*2003) 5

Gillespie v. United States Steel Corp.
379 U.S. 148, 152-153 (1964) 5

IAPMO v. Cal. Building Standards Comm.
55 Cal.App.4th 245, 248 (1997) 3

Moncharsh v. Heily & Blase
3 Cal.App. 1, 12 (1992) 2

Pierce County, Washington v. Guillen
___ U.S. ___ 123 S. Ct. 720, 728, 154
L.Ed.2d 610, 623 (Jan. 2003) 4,6

Cases **Pages**

Radio Station WOW, Inc. v. Johnson
362 U.S. 120, 124 5

Southland v. Keating
465 U.S. 1 (1984) 4

Statutes **Pages**

Cal. Const., art. I §16 25

Cal. Health and Safety Code §17921(a) 3

Cal. Health and Safety Code §17957 3

Cal. Health and Safety Code §17995 3

Cal. Health and Safety Code §17995.1 3

Cal. Health and Safety Code §19825 3

Cal. Health and Safety Code §19826 3

Cal. Health and Safety Code §19835 3

Cal. Business and Professions Code §5510 3

Cal. Business and Professions Code §5536 3

Cal. Business and Professions Code §6710 3

Cal. Business and Professions Code §7000.5 3

Cal. Business and Professions Code §7028 3

Cal. Business and Professions Code §7071.5 3

Statutes	Pages

Cal. Code of Civil Procedure §1298.7 . . . . . 3, 4

Cal. Code of Civil Procedure §337.1 4

Cal. Code of Civil Procedure §337.15 4

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Marvin Jr. and Lynn St. Germain, *et. al.* ("Home Buyers") respectfully submit their Reply to the Brief by U.S. Home Corporation ("US Home) to their Petition for a Writ of Certiorari:

I. INTRODUCTION

US Home addresses only technical issues in its Opposition to Home Buyers' Petition for Writ of Certiorari, and does not address the merits of the compelling issues presented for review. Home Buyers' Petition invokes concerns regarding the denial of their right to jury trial and right to appeal, striking at the very heart of due process concerns. The issues presented are of compelling interest to consumers throughout the nation, who are faced with adhesive arbitration clauses, imposed by large corporate entities, leaving them without any meaningful ability to negotiate the terms.

It is submitted, therefore, that the Court should exercise its authority to review the issue on the merits, and expeditiously resolve this matter of national concern.

II. HOME BUYERS HAVE BEEN DENIED DUE PROCESS AND THEIR RIGHTS UNDER CALIFORNIA LAW

US Home's position is that Home Buyers, who are currently living in homes with serious defects, injurious to their health and safety, and which are continuing to deteriorate, should be forced to give up their right to trial by jury and appeal, without any chance at meaningful review, until such time as they jump through myriad hoops: First following through with the

mediation/arbitration process,[1] then reducing the award to a judgment, then appealing the ruling on the order compelling arbitration to an intermediate court of appeal, and finally petitioning the California Supreme Court for a Writ of Review before proceeding to petition for writ of certiorari to this Court. (And, if successful in the U.S. Supreme Court, starting the process all over at the state trial court level.) The final resolution of this matter would be further complicated for Home Buyers, as they would concurrently be required to pursue their claims against subcontractor and design professionals, who are not parties to the arbitration agreement, in state court. (Petitioners' Brief at pages 4, 8.)

It is unquestionable that absent the arbitration clause in the contract Home Buyers would be eligible to a trial by jury on their numerous fact-based claims. The right to trial in California is inviolate. Cal. Const., art. I, § 16; *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173.

Moreover, leaving the trial court's decision compelling arbitration intact effectively denies Home Buyers any right to meaningful appeal on the merits of their case. Under California law, the right to appeal after an arbitration award is so highly circumscribed as to sanction a virtual miscarriage of justice. *Moncharsh v. Heily & Blase* (1992) 3 Cal.App. 1, 12 ("With narrow

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[1] In fact, not only does the arbitration clause at issue involve an arbitration process, it contemplates a two-part process before an arbitrator's award could be reduced to an appealable judgment: First a mediation in accordance with the rules of the Commercial Mediation Rules of the American Arbitration Association, and then, if not resolved, resolution of the claim in accordance with the Commercial rules of the American Arbitration Association. (Petitioner's Brief at page 2.)

exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.")

California has evinced a strong interest in ensuring the integrity of new homes purchased by residents of this state. See, e.g. *Health and Safety Code* sections 17921(a), 17957, 17995, 17995.1, 19825, 19826, and 19835; *Business and Professions Code* sections 5510, 5536, 6710, 7000.5, 7028, 7071.5; *IAPMO v. Cal. Building Standards Comm.* (1997) 55 Cal.App. 4th 245, 248 (stating: "There is no question that regulation of the building industry is an appropriate exercise of the state's police power.").

California courts have also recognized this interest: As stated in *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 867:

> A home is not only a major investment for the usual buyer but also the only shelter he has. *Hence it becomes doubly important to protect him against structural defects that could prove beyond his ability to remedy.* (emphasis added.)

This concern for protecting California purchasers of these major investment items is reflected by the California legislature's action (like that of legislatures in numerous other states) in enacting Code of Civil Procedure section 1298.7, which renders arbitration

agreements unenforceable in actions involving defective residential construction.[2]

Unfortunately, California courts have felt constrained by this Court's rulings in *Allied-Bruce Terminix Companies, Inc. v. Dobson* 513 U.S. 265 (1994) and *Southland v. Keating* 465 U.S. 1 (1984) to enforce arbitration clauses in defective residential construction cases, denying home buyers the very protection the legislature intended, and allowing large developers to strip their customers of the right to trial by jury guaranteed them under state law.

III. THE COURT SHOULD EXERCISE ITS AUTHORITY TO REVIEW THIS MATTER AT THIS STAGE OF THE PROCEEDINGS.

US Home cites only to *Pierce County, Washington v. Guillen*, __U.S.__, 123 S.Ct. 720, 728, 154 L.Ed.2d 610, 623 (Jan. 2003) as U.S. Supreme Court authority for the proposition that the petition for writ of certiorari is premature. *Pierce County* relies on an earlier Court ruling, *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469, 479 (1975), which elucidated a principle of flexibility in determining the "finality" of judgments for the purposes of Supreme Court review on certiorari.

This Court, in *Cox* proclaimed that the finality of judgments rule should not be "mechanically" applied:

"'[O]ur cases long have recognized that

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[2] Code of Civil Procedure section 1298.7 incorporates lawsuits of this nature by reference to actions governed by Code of Civil Procedure sections 337.1 and 337.15, which define actions involving defective construction which are subject to special statutes of limitation.

> whether a ruling is "final" within the meaning of § 1292 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." (Citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) [internally citing *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 546 [1949]].)

The Court in *Cox* also recognized that the fact that additional proceedings may be pending in the state court is not conclusive, when "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice.'" *Id.* at 478-479 (citing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124.)

While in *Cox* the Court recognized four distinct exceptions to the rule of finality, these should not be regarded as exclusive. In fact, the Court spoke of the cited exceptions in non-exclusive language, referring to "***at least*** four categories" in which the Court, to that date, had taken jurisdiction without awaiting the full completion of proceedings in the lower state courts. *Id.* at 478. (emphasis added.)[3]

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[3] In fact, only recently, albeit without jurisdictional discussion, the Court, in *Franchise Tax Board of California v. Hyatt*, __U.S.__, 123 S. Ct. 409, 154 L.Ed. 2d 289 (*2003)

The gravamen of the Court's ruling in *Guillen* is distinguishable from that in the instant case. The issue in *Guillen* involved a mere discovery dispute. The Court found that Pierce County would still have its day in court and that the discovery dispute was not necessarily determinative of the outcome in that case. *Guillen, supra.* 123 S.Ct at 728 n.5. Here, in contrast, Home Buyers will not get their "day in court" but will be compelled to follow a tortuous and labyrinthine path designed to exclude them from the court. They will be compelled to arbitrate the substantive issues without any right to trial by jury or to appeal on the merits of the factual and legal issues presented but only be able, absent extraordinary error or misfeasance by the arbitrator, to raise whether the order compelling arbitration, which this Court can review now, was proper.

As set forth above, awaiting finality, in the strict sense, in the instant matter would be a waste of economic and judicial resources, in light of the tortuous path involved to achieve review by certiorari. The harm in this case is exacerbated by the fact that Home Buyers are unable to make needed repairs to their domiciles in the interim, and are faced with the situation of giving up their valuable rights to trial by jury and appeal in order to achieve a faster, but potentially unsatisfactory, and possibly unjust resolution., with no further judicial recourse on the merits of the case, without immediate U.S. Supreme Court involvement.

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reviewed a decision of the Nevada Supreme Court on a grant of certiorari, where a petition for writ of mandamus was granted in part and denied in part, leaving intentional tort claims intact for trial in the lower court.

IV. CONCLUSION

Home Buyers, by their Petition for Certiorari, have asked this Court to resolve an issue of great importance to California home purchasers, and home buyers nationwide, who are faced with a loss of due process rights, which, in this case, the California State Legislature has sought to protect. It is respectfully submitted that this Court should intervene at this stage in the proceedings, and grant certiorari so that the matter may be decided on the merits.

Respectfully submitted,

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